123 FERC ¶ 61,061
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Niagara Mohawk Power Corporation Docket No. ER07-1096-002

ORDER DENYING REHEARING

(Issued April 21, 2008)

1. In this order the Commission denies Niagara Mohawk Power Corporation's (Niagara Mohawk) request for rehearing of the Commission's November 19, 2007 Order.[1] The November 19, 2007 Order accepted an interconnection agreement (Rensselaer IA) and the first amendment to that interconnection agreement (Amended Rensselaer IA) between Niagara Mohawk and Hadson Power Partners of Rensselaer and ordered Niagara Mohawk to refund the time value of revenues collected from June 30, 1998 through August 27, 2007.

Background

2. On June 28, 2007, Niagara Mohawk filed the Rensselaer IA dated June 9, 1992, and the Amended Rensselaer IA dated May 7, 1998, governing the interconnection of the Rensselaer cogeneration facility to Niagara Mohawk's transmission system.[2] The Amended Rensselaer IA reflected the pending implementation of the Master Restructuring Agreement (MRA) between Niagara Mohawk and a number of independent power producers, including the owner of the Rensselaer plant. The MRA released Niagara Mohawk from the obligation of purchasing the full output of the Rensselaer plant under the existing power purchase agreement. The MRA was consummated on June 30, 1998, but Niagara Mohawk stated in its filing that it continued to purchase the full output of the Rensselaer plant until March 31, 2001. Niagara Mohawk acknowledged in its filing that it was required to refund the time value of revenues collected under the Amended Rensselaer IA from the period when the

[1] *Niagara Mohawk Power Corporation*, 121 FERC ¶ 61,183 (2007) (November 19, 2007 Order).

[2] The Commission certified the Rensselaer cogeneration facility as a qualifying facility (QF) on September 18, 1991. *Hadson Power Partners of Rensselaer*, 56 FERC ¶ 62,192 (1991).

agreement became subject to the Commission's jurisdiction until the date the Commission authorized the charges under that agreement. Niagara Mohawk asserted that the Commission's general rule regarding Commission jurisdiction over QF interconnection agreements is that Commission jurisdiction does not commence until the electric utility interconnecting with the QF ceases to purchase all of the QF's output and instead transmits the QF power in interstate commerce.

3. In the November 19, 2007 Order, the Commission conditionally accepted for filing the Rensselaer IA and the Amended Rensselaer IA, effective August 28, 2007. The Commission directed Niagara Mohawk to file an amended IA to reflect an effective date of August 28, 2007, and to refund the time value of revenues collected from June 30, 1998 through August 27, 2007. The Commission held that where a QF may sell any of its output to a third-party utility, the Commission has exclusive jurisdiction over the interconnection between the QF and the directly interconnected utility and exclusive jurisdiction over agreements affecting or relating to such service (and the rates for such service). Thus, the Commission found that Commission jurisdiction attached to the subject interconnection agreement on June 30, 1998, the consummation date of the agreement that released Niagara Mohawk from its obligation to purchase the entire output of the Rensselaer QF.

Request for Rehearing

4. Niagara Mohawk requests rehearing on the grounds that the Commission erred in exercising jurisdiction over the Amended Rensselaer IA and requiring time-value-of-revenue refunds as of June 30, 1998. Niagara Mohawk contends that this decision was inconsistent with Commission precedent, and that Niagara Mohawk was entitled to rely on that precedent.[3]

5. Niagara Mohawk asserts that the Amended Rensselaer IA became jurisdictional when the QF actually made sales to the third-party purchasing utility, rather than when it obtained the contractual right to make such sales. Niagara Mohawk argues that, in *Western Massachusetts*, the Commission addressed the boundary between state and federal jurisdiction and held that states exercise jurisdiction over direct interconnections between a QF and a public utility when the directly interconnected utility purchases the

[3] *Citing Western Massachusetts Electric Company*, 59 FERC ¶ 61,091, *reh'g denied*, 61 FERC ¶ 61,182 at 61,662 (1992), *aff'd*, 165 F.3d 922 (D.C. Cir. 1999) (*Western Massachusetts)*; *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

QF's full output. Niagara Mohawk adds that in *Western Massachusetts* the Commission also held that an IA becomes jurisdictional when a third-party utility will purchase the QF's output. Niagara Mohawk argues that in *Western Massachusetts* the Commission did not state or imply that the mere right of a QF to sell power to a third-party utility was the test for when Commission jurisdiction attached to an interconnection agreement between the QF and the interconnected utility. According to Niagara Mohawk, *in Western Massachusetts* the Commission stated that section 292.306(a) of its regulations, which provides that state regulatory authorities will determine QF-related interconnection costs, "is not applicable to transactions involving utilities transmitting QF power in interstate commerce, but is limited to purchases or sales of power between the electric utility obligated to purchase from or sell to a QF and that QF."[4] The Commission then found that the agreements relating to the interconnection service were subject to Commission jurisdiction because the interconnected utility "will purchase none of the QF's output."[5] Niagara Mohawk contends that this language suggests that, the Commission's determination in *Western Massachusetts* as to whether it had jurisdiction over the agreements was based on a factual assessment of whether the interconnected utility was purchasing the full output of the QF, not whether the QF had a contractual right to sell to third parties.

6. Niagara Mohawk also states that in Order No. 2003 the Commission did not state that jurisdiction over QF-related interconnections would be determined by the potential of a QF to make sales to third parties. Rather, according to Niagara Mohawk, the Commission emphasized that it would assert jurisdiction if "the QF's owner sells any of the QF's output to an entity other than the electric utility directly interconnected to the QF," but that states would continue to exercise jurisdiction over QF interconnection agreements "when the owner of the QF sells the output of the QF only to an interconnected utility or to on-site customers."[6]

7. Niagara Mohawk asserts that the plain meaning of the above quoted language is that the line between Commission and state jurisdiction over QF-related interconnection agreements is based on the answer to a factual question – is a QF selling all of its output to the interconnected utility, or is it selling at least some portion of its output to a third-party utility or utilities? Niagara Mohawk contends that the November 19, 2007 Order seems to represent a new policy regarding the Commission jurisdiction over QF-related

[4] *Citing Western Massachusetts*, 61 FERC at 61,662.

[5] *Id.*

[6] *Citing* Order No. 2003 at P 813.

interconnection agreements and that the Commission cannot depart from past precedent without a reasoned explanation.[7] Niagara Mohawk further contends that no such explanation was provided in the November 19, 2007 Order.

8. Niagara Mohawk argues that basing Commission jurisdiction on whether a QF has a contractual right to make third-party sales, regardless of whether such sales are made, is an ill-advised policy change that arguably sweeps under the Commission's jurisdictional umbrella any contract that does not explicitly foreclose sales to third parties, even if such sales never occurred. Thus, according to Niagara Mohawk, the November 19, 2007 Order creates vast uncertainty as to the jurisdictional status of hundreds of contracts entered into under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) 16 U.S.C. § 824a-3 (2000 & Supp. V 2005), over the past 20-plus years and undermines the regulatory certainty necessary to develop and sustain robust electricity markets.

9. In addition, Niagara Mohawk states, even assuming, *arguendo*, that the Commission's new standard represents a reasonable clarification of its policy for asserting jurisdiction over QF-related interconnection agreements, it is manifestly unfair to apply that new standard to the Amended Rensselaer IA in such a manner as to require Niagara Mohawk to now pay refunds for the time period during which it continued to purchase the full output of the Rensselaer plant. Niagara Mohawk further states that it was reasonable for Niagara Mohawk, based on the Commission's statements in *Western Massachusetts* and Order No. 2003, to interpret its obligation to file the Amended Rensselaer IA as not being triggered until such time as it ceased to purchase the full output of the Rensselaer plant. Niagara Mohawk contends that requiring it to pay refunds relating to the period during which it reasonably believed it had no obligation to file the Amended Rensselaer IA would not further the purpose of the Commission's policy that utilities pay time-value-of-revenue refunds relating to unfiled jurisdictional agreements, which is to ensure that such documents are filed in a timely manner. Moreover, according to Niagara Mohawk, even if the Commission were to articulate a good reason for the change in its policy regarding its review of QF-related interconnection agreements, it would be inappropriate for the Commission to apply such a change to Niagara Mohawk and other entities on a retroactive basis.[8]

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[7] *Citing ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 71 F.3d 897, 901 (D.C. Cir. 1995); *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985).

[8] *Citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208–09 (1988) ("By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by congress in express terms. . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

10. On January 3, 2008, Rensselaer Cogeneration LLC (Rensselaer) filed an answer to the request for rehearing.

Commission Determination

11. As an initial procedural matter, Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2007), prohibits an answer to a request for rehearing. Accordingly, Rensselaer's answer will be rejected.

12. The Commission denies rehearing. Niagara Mohawk's arguments are unpersuasive. The Commission stated in the November 19, 2007 Order that the critical date was June 30, 1998, the date on which Niagara Mohawk was released from its obligation to purchase the entire output of the Rensselaer QF. The Commission explained that

> where a QF may sell any of its output to a third-party utility, i.e., a utility not directly interconnected to the QF, the Commission has exclusive jurisdiction over the interconnection between the QF and the directly interconnected utility, and exclusive jurisdiction over agreements affecting or relating to such service (and the rates for such service); any attempt by a state authority to exercise jurisdiction over such service and agreements (and rates) would be *ultra vires.* An agreement which releases the interconnecting utility from its obligation to purchase the QF's full output authorizes the QF to make sales that require the transmission of electric energy in interstate commerce, and any interconnection agreements affecting or relating to such sales require Commission authorization. We accordingly find that Commission jurisdiction attached to the subject interconnection agreement on June 30, 1998, the consummation date of the MRA which Niagara Mohawk concedes released it from its obligation to purchase the entire output of the Rensselaer QF and authorized the Rensselaer QF to make sales to third-party utilities.[9]

13. This finding is consistent with Commission precedent. In *Western Massachusetts, inter alia*, the utility argued that agreements were not jurisdictional, (1) because they were with a QF, and, as particularly relevant here, (2) because the payments were made prior to energizing the facilities. Thus, the utility objected to the "requirement that [the utility] formally file" the agreements,[10] and argued that three of the agreements at issue "involve[d] services to be undertaken and completed *before* the interconnection facilities [were] placed in operation."[11] The Commission found otherwise; the Commission,

[9] November 19, 2007 Order at P 13.

[10] *Western Massachusetts*, 61 FERC at 61,661.

[11] *Id.* at 61,660 (emphasis added).

having found the agreements jurisdictional, required that they "be formally filed."[12]. The Commission explained that it was "necessary to distinguish between matters subject to state regulation and matters subject to the Commission's exclusive jurisdiction."[13] In addressing the boundary between state jurisdiction and Commission jurisdiction, the Commission stated that section 292.306(a) of its regulations, 18 C.F.R. § 292.306(a) (dealing with state jurisdiction over interconnections), "is not applicable to transactions involving utilities transmitting QF power in interstate commerce, but *is limited to purchases or sales of power between the electric utility obligated to purchase from or sell to a QF and that QF.*"[14] Here, as of June 30, 1998, the utility, Niagara Mohawk, was no longer obligated to purchase the entire output of the Rensselaer QF.

14. While the Commission issued Order No. 2003 after the time period at issue here, Niagara Mohawk's contention that the finding in the November 19, 2007 Order is inconsistent with Order No. 2003 is incorrect. In Order No. 2003, the Commission responded to commenters who, *inter alia*, requested that a QF be allowed to request interconnection under state authority when it either sold the majority of its output under a PURPA-based power sales agreement, or did not sell power to the wholesale market. The Commission stated:

> When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it purchases the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs. But when an electric utility interconnecting with a QF does not purchase all of the QF's output and instead transmits the QF power in interstate commerce, the Commission exercises jurisdiction over the rates, terms, and conditions affecting or related to such service, such as interconnections.
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> Thus, the Commission has jurisdiction over a QF's interconnection to a Transmission System if the QF's owner sells any of the QF's output to an entity other than the electric utility directly interconnected to the QF. Because the presence of *any* output sold to a third party determines

[12] *Id*. at 61,661.

[13] *Id*.

[14] *Id*. at 61,662 (emphasis added); *accord Western Mass. Electric Co. v. FERC*, 165 F.3d 922, 926 (D.C. Cir. 1999); *cf. Western Massachusetts*, 61 FERC at 61,662 n.17 (discussing electric utility's release from its obligation).

> Commission jurisdiction, we reject . . . [the] requests that we establish jurisdiction over QF interconnections based on the amount of energy sold to a third party.[15]

The Commission also stated:

> Accordingly, this Final Rule applies when the owner of the QF seeks interconnection to a Transmission System to sell any of the output of the QF to a third party. This jurisdiction applies to a new QF that plans to sell its output to a third party, and to an existing QF interconnected to a Transmission system that historically sold its total output to an interconnected utility or on-site customer and now plans to sell output to a third party.[16]

15. The question here is *when* Commission jurisdiction attaches. Under Niagara Mohawk's interpretation, jurisdiction would attach only *after* the QF sells some or all of its output to a third-party utility. But, in fact, Commission approval of an interconnection agreement is needed for the wholesale sale to take place. Order No. 2003 states that it applies to a QF (new or existing) that "plans to sell" to a third party.[17] Thus, logically, Commission jurisdiction attaches at the point in time where the directly interconnected utility is no longer obligated to buy the entire output and the QF has the right to sell to a third party. In the instant case, insofar as Rensselaer had the right to sell to a third party beginning June 30, 1998, it was receiving a Commission jurisdictional interconnection service from Niagara Mohawk beginning June 30, 1998. This interconnection service was necessary to permit any third-party sales that Rensselaer chose to make and which Rensselaer was authorized to make by the MRA. Regardless of whether Rensselaer actually made third-party sales before April 1, 2001, as of June 30, 1998, Rensselaer was entitled to exercise its rights, and the Amended Rensselaer IA was prerequisite to Rensselaer exercising its rights, to make the third-party sales authorized by the MRA.

16. Niagara Mohawk is mistaken in characterizing this finding as a change in policy or as a new standard. Rather, this policy is consistent with *Western Massachusetts*, is referenced in Order No. 2003,[18] and follows logically from the Commission's jurisdiction over interconnection agreements that allow a QF to make wholesale power sales in

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[15] Order No. 2003 at P 813–14 (citations omitted; emphasis in original).

[16] *Id.* P 14.

[17] *Id.*

[18] As Niagara Mohawk pointed out, the discussion in Order No. 2003 of QF interconnections is based on *Western Massachusetts*. *See* Order No. 2003 at P 813; Niagara Mohawk September 20, 2007 Response to Deficiency Letter.

interstate commerce. Indeed, our decision in this proceeding is consistent with the Federal Power Act (FPA)[19] and our implementing regulations[20] that, absent waiver, a rate schedule should be filed at least 60 days prior to the commencement of jurisdictional service. In contrast, Niagara Mohawk essentially argues that an IA need not be filed until after jurisdictional service commences.

17. Finally, Niagara Mohawk argues that, even assuming the November 19, 2007 Order is a reasonable clarification of Commission policy regarding its jurisdiction over QF-related interconnection agreements, it is unfair to apply that clarified standard to the Amended Rensselaer IA in such a manner as to require it to pay refunds for the time period during which it continued to purchase the full output of the Rensselaer plant. We disagree. The Commission emphasized in its *Prior Notice* order that complying with FPA section 205 is the utility's responsibility and that where there is any doubt, the onus is on the utility to file with the Commission: "to the extent a utility remains uncertain, even after consulting this order. . . , as to its obligation to file rates and charges for a particular transaction or type of transaction, it should assume the initiative to seek a specific ruling."[21] Rejecting calls for further amnesty periods to file previously-unfiled agreements beyond those it had already allowed, the Commission declared that "[i]f still unsure, utilities should take the precaution to file all questionable agreements as soon as possible. . . ."[22] Thus, to the extent it was unclear whether Niagara Mohawk was required to file the Amended Rensselaer IA to enable Rensselaer to exercise its right to sell to third-party utilities, it was Niagara Mohawk's responsibility to resolve that ambiguity by making a filing.[23] A failure to timely file rate schedules is not a minor infraction of the law. Utilities are statutorily required to have their rates, terms and conditions on file and

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[19] 16 U.S.C. § 824d(c) (2000 & Supp. V 2005).

[20] 18 C.F.R. § 35.3 (2007).

[21] *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,977–78 (*Prior Notice*), *order on reh'g*, 65 FERC ¶ 61,081 (1993); *cf. Kentucky Utilities Company*, 45 FERC ¶ 61,409 at 62,293–94 (1988) (no inequity results from allowing a utility to suffer the consequences of its decision to rely on its own interpretation of Commission policy, rather than seeking Commission interpretation of that policy).

[22] *Prior Notice*, 64 FERC at 61,978.

[23] We note that Niagara Mohawk has at no time claimed that there was good cause for its admitted delay in filing the Amended Rensselaer IA. The only issue is how late Niagara Mohawk was in filing the Amended Rensselaer IA, i.e., whether it should have filed in 1998 or in 2001, and, thus, whether it owes time-value refunds from 1998 or from 2001.

without those rates, terms and conditions on file, the Commission cannot timely determine whether those rates, terms and conditions are just, reasonable, and not unduly discriminatory or preferential.[24]

18. Accordingly, for the reasons explained above, the Commission denies Niagara Mohawk's request for rehearing.

19. With respect to the refunds, we reiterate here that the time-value refund is not open-ended: For those situations in which we impose the time-value remedy pursuant to *Prior Notice*, we limit the application of the time-value formula to an amount that permits a public utility to recover its variable costs. Such information, if pertinent, shall be submitted with Niagara Mohawk's refund report.[25]

The Commission orders:

(A) The answer to the request for rehearing is hereby rejected, as discussed in the body of this order.

(B) The request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[24] *See generally El Paso Electric Co.*, 105 FERC ¶ 61,131 (2003).

[25] *See Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1988) (Carolina). In *Carolina* we stated "[w]e believe that this result is equitable in that no public utility will face the prospect of losing money on a sale under late-filed rates that otherwise are accepted for filing. The public utility will be returning to its customers only the interest on monies that it was never authorized to receive, with a floor to protect the company from operating at a loss."